94CV05165-NG-MO DF C/M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ALEX P. MITCHELL and JOHN AKINRELE,
Plaintiffs,

v.

THE NEW YORK BLOOD CENTER and LOCAL 1199, DRUG, HOSPITAL AND HEALTH CARE EMPLOYEES UNION, RWDSU, AFL-CIO,
Defendants.

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94 CV 5165 (NG)

MEMORANDUM AND ORDER

Gershon, United States District Court:

Both of the defendants in this employment discrimination action, The New York Blood Center ("NYBC") and Local 1199 of the Drug, Hospital and Health Care Employees Union ("Local 1199"), have moved pursuant to Federal Rule of Civil Procedure 56 to dismiss all of the plaintiffs' claims. After reviewing the extensive briefing submitted on the motion, and after hearing oral argument, I have determined that disputed issues of material fact exist with respect to the claims of plaintiff Alex P. Mitchell and that the defendants' motions for summary judgment as to these claims should be denied. I have also determined, however, that both defendants are entitled to summary judgment with respect to the claims of plaintiff John Akinrele. This memorandum and order will set forth my reasons for the determination that Akinrele's claims should be dismissed.

FACTS

The following facts are undisputed. Akinrele is of African descent. NYBC provides blood bank services for hospitals throughout the New York metropolitan area. The operations of NYBC's Melville, New York facility, at which the plaintiff was employed, and

which has been closed since 1994, included the manufacture of various pharmaceutical products from blood plasma. Akinrele was employed by NYBC from 1982 until the closing of the Melville facility. At all relevant times, Akinrele was a member of Local 1199.

At the time he left NYBC's employ, Akinrele was a fractation technician, a position to which he was promoted in 1987. When the Melville facility was closed in 1994, Akinrele, along with approximately 130 other NYBC employees, was laid off. In the months following his lay off, Akinrele remained in touch with NYBC concerning open positions at other facilities. In August 1994 he applied for the position of Component Technician at NYBC's Long Island Blood Services Division. Also applying for the position were four whites who had previously been employed at the Melville facility. Two of these individuals had more seniority than Akinrele. The individual selected for the job was one of the two white employees with less seniority than Akinrele.

On October 24, 1994 Akinrele filed a charge with the Equal Employment Opportunity Commission ("EEOC"). On the charge form, Akinrele described his complaint as follows:

> I was employed as a technician with the New York Blood Center from 1982 to January 1994. Throughout my employment with the New York Blood Center I have been subjected to discriminatory and disparate treatment because of my race, color, national origin and in retaliation for filing several grievances against the New York Blood Center. In January 1994, I was subjected to a retaliatory and discriminatory discharge by the New York Blood Center. In September 1994 I applied for a technician position at the New York Blood Center. I was denied the position even though I was qualified for same and I should have been recalled to same by the Blood Center.
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> I have also been discriminated against by Local 1199 by its failure to pursue any of my said grievances with the New York Blood Center.

With his EEOC charge, Akinrele also filed an affidavit declaring that throughout his

employment with NYBC he had been subjected to discriminatory and disparate treatment. Akinrele received a right to sue letter from the EEOC on November 9, 1995.

In the amended complaint in this action, which is dated August 9, 1996, Akinrele raises claims against NYBC under 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, §§ 701 *et seq.*, 42 U.S.C. §§ 2000e *et seq.*, and the New York Human Rights Law, Executive Law, §§ 290 *et seq.* Local 1199 was named as a defendant only in the amended complaint and, in their opposition to the instant motions, the plaintiffs have withdrawn all claims against Local 1199 save for a claim under 42 U.S.C. § 1981.

DISCUSSION

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." It is the movant's burden to demonstrate the absence of any genuine issue of material fact, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), which are facts whose resolution would "affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In making a determination as to whether a genuine dispute as to a material fact exists, "all justifiable inferences" from the factual record before the court are to be drawn in favor of the non-movant." *Id.*, at 255.

A. Title VII Claims.

The timely filing of a charge with the EEOC is a prerequisite to the maintenance of a Title VII action. *Butts v. City of New York*, 990 F.2d 1397, 1401 (2d Cir. 1993). In New

York, where a state agency exists to investigate charges of employment discrimination, a charge of discrimination must be filed within 300 days of the occurrence of the conduct of which the charging party complains. *Lambert v. Gennesee Hosp.*, 10 F.3d 46, 53 (2d Cir. 1993). Summary judgment is warranted as to Akinrele's Title VII claim against NYBC because his EEOC filing was not timely.

Akinrele filed his EEOC complaint on October 24, 1994 and, therefore, all claims arising from conduct prior to December 28, 1993 are time-barred. There are two acts contained in Akinrele's EEOC charge that occurred after that date: his lay-off from NYBC upon the closing of its Melville facility and his failure to receive the position of Component Technician at NYBC's Long Island Blood Services Division.

With respect to Akinrele's first timely claim, Akinrele himself, in the plaintiffs' opposition to the instant motions, "concede[s] that his lay off in or about February 1994 was not discriminatory." Pltfs.' Mem at 23. He argues, however, that "there exists a genuine dispute as to whether the rejection of [him] for the Component Technician position in September 1994 was discriminatory." *Id.*

As to this claim, Akinrele cannot meet the initial burden facing a Title VII plaintiff. In order to state a claim under Title VII, a plaintiff must first establish a *prima facie* case, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973), which, in a failure to hire or promote case, consists of four elements: 1) membership in the protected group; 2) qualification for the position sought; 3) an adverse employment action; and 4) a showing that the adverse employment action took place under circumstances giving rise to an inference of discrimination. *Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 63 (2d Cir. 1997). Akinrele applied for the job along with four white applicants. There is no allegation that any

of the five applicants were unqualified for the position. The white individual who received the job had less seniority than Akinrele, but two of the rejected white applicants had more than he. Even assuming a policy to rehire laid off workers according to seniority, as to which there is a factual issue, under these circumstances, his failure to receive the Component Technician position does not raise an inference of discrimination.

In an attempt to overcome his timeliness problem, Akinrele argues that a "pattern or practice" of discrimination existed at NYBC throughout the time he was employed there and that, as a result, he may raise a Title VII claim with respect to *any* incident of discrimination involving him throughout the period of his employment. However, the quantum of evidence required to prove the existence of a pattern or practice of discrimination is quite substantial:

> [A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, . . . a company repeatedly and regularly engaged in acts prohibited by the statute. The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of pattern or practice.

Teamsters v. United States, 431 U.S. 324, 336 n. 16 (1977). Akinrele supports his contention that a pattern or practice of discrimination existed at NYBC by the submission of five affidavits from NYBC employees, including himself and Mitchell, that assert the occurrence of certain discriminatory acts at NYBC over a period of years. They are not sufficient to establish the existence of a pattern or practice of discrimination. *See In re Western Dist. Xerox Litig.,* 850 F. Supp. 1079, 1086 (W.D.N.Y. 1994) (individual incidents, without more, do not "give rise to an inference that defendant engaged in a corporate-wide pattern or practice of discrimination"). I conclude that Akinrele has not raised a timely claim under Title VII.

Akinrele's reliance upon the "continuing violation" doctrine is similarly unavailing. Under that doctrine "where specific and related instances of discrimination are permitted by the employer to go unremedied for so long as to amount to a discriminatory policy or practice," a court may hear all Title VII claims related to the policy or practice without regard to timeliness. *Van Zant v. KLM Royal Dutch Airlines,* 80 F.3d 708, 713 (2d Cir. 1996) (citations omitted). Akinrele's proffered evidence is not sufficient to establish that a discriminatory poliey or practice existed at NYBC. And, Akinrele's claims of a hostile work environment in the early 1980's, directed at him, are too remote to be treated as part of a continuing violation.

B. New York Human Rights Law Claims.

Claims under the New York Human Rights Law must be brought within three years of the occurrence of the discrimination of which the plaintiff complains. *Murphy v. American Home Prods. Corp.,* 58 N.Y.2d 293 (1983). A plaintiff bringing such a claim must establish a *prima facie* case in the same manner as a Title VII plaintiff. *Miller Brewing Co. v. State Div. of Human Rights,* 66 N.Y.2d 937, 938-39 (1985). Since Akinrele cannot establish a *prima facie* case as to any act of discrimination occurring within three years of the filing of the original complaint on November 7, 1994, his claims under the New York Human Rights Law must be dismissed.

C. Section 1981 Claims.

Claims under Section 1981 are governed by New York's three-year statue of limitations for personal injury actions. *Butts v. Dept. or Housing Preservation and Development,* 990 F.2d 1397, 1412 (2d Cir. 1993). Since Akinrele has raised no issue of fact as to discrimination occurring within three years prior to the filing of the original complaint,

he has no claim under Section 1981 that is not time-barred. This conclusion applies with even greater force to Local 1199, against which only Section 1981 liability is asserted, because it was not made a party to this action until the filing of the amended complaint in August 1996.

CONCLUSION

The summary judgment motions of NYBC and Local 1199 are DENIED with respect to Alex Mitchell. They are GRANTED with respect to John Akinrele and as to his claims the amended complaint is dismissed. Mitchell and the defendants are directed to submit a joint pretrial order within 20 days of the date of this order.

SO ORDERED.

Nina Gershon
United States District Judge

Dated: October 1, 1998
Brooklyn, New York